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FIRST DIVISION
September 3, 2013

No. 1-12-2968
2013 IL App (1st) 122968-U

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

AREA WIDE 79TH & WESTERN LLC and)	Appeal from the
FAYSAL MOHAMED,)	Circuit Court of
)	Cook County
Plaintiffs-Appellants,)	
)	
v.)	No. 12 L 3814
)	
FRANCIS KELDERMANS and HOLLAND &)	Honorable
KNIGHT, LLP,)	Sanjay Taylor,
)	Judge Presiding.
Defendants-Appellees.)	

PRESIDING JUSTICE CONNORS delivered the judgment of the court.
Justice Harris and Justice Simon concurred in the judgment.

ORDER

Held: Where plaintiffs filed legal malpractice claim beyond statute of limitations, plaintiffs failed to establish that equitable estoppel barred defendants from asserting limitations defense.

¶ 1 Plaintiffs Area Wide 79th & Western LLP (Area Wide) and Faysal Mohamed sued their attorney, defendant Francis Keldermans, and his law firm defendant Holland & Knight, LLP for malpractice due to an allegedly botched lease contract during a complex real estate transaction.

Defendants invoked the statute of limitations as an affirmative defense to plaintiffs' claim, and the circuit court dismissed the case. We affirm.

¶ 2 This appeal comes to us following a motion to dismiss under section 2-619 of the Code of Civil Procedure (735 ILCS 5/2-619 (West 2010)), so we take as true the facts alleged in the complaint and any affidavits in the record. See *Stein v. Krislov*, 2013 IL App (1st) 113806, ¶ 9. Mohamed is the managing partner of Area Wide, which was formed to develop a property in the vicinity of 79th and Western in Chicago. The plan called for Area Wide to construct a building on the property, which was intended to house a Walgreens store, as well as a partially prepared outlot that would then be sold to TCF Bank for later construction of a branch bank. Because the various areas of the property would be either leased to Walgreens or sold to TCF, however, the plan required obtaining cross-easements for customer parking, ingress, and egress (known as "Reciprocal Easement Agreements" or REAs) from the bank and Walgreens. The REAs were crucial to the deal because the proposed TCF site would be otherwise inaccessible.

¶ 3 Keldermans had represented Mohamed and his various business ventures for over 20 years, including in other deals that called for REAs, so Area Wide engaged Keldermans' firm, Holland & Knight, to represent it during the project. While preparing the lease contract between Walgreens and Area Wide, however, Keldemans allegedly failed to include a clause that would require Walgreens to grant the necessary REAs to TCF. By the time the mistake was discovered, however, the lease had already been signed by the parties. Keldermans went to Walgreens and requested that it grant the easements anyway, but he was rebuffed. Mohamed then approached Walgreens himself, but he too was turned away. (According to the complaint, Walgreens was completely unsympathetic to Mohamed's plight, telling him, "[T]oo bad, you should not have signed the lease.")

¶ 4 While all of this was going on, the property had been acquired, construction was proceeding, and the sale agreement with TCF had already been executed. But when TCF learned that the REAs from Walgreens would not be forthcoming, TCF cancelled its contract with Area Wide on May 9, 2008. Without the sale to TCF, the whole development project fell apart. By this point, plaintiffs had invested over \$250,000 in preparing the site for TCF, and they lost the expected \$2.2 million that TCF had agreed to pay for the site. The real trouble, however, was that the property for the entire project had been mortgaged to another bank as security for a loan, which was also guaranteed by Mohamed. After the deal unraveled, Area Wide found itself unable to pay its bills and the bank foreclosed on the mortgage in 2010.

¶ 5 Plaintiffs eventually filed suit against Keldermans and Holland & Knight on April 10, 2012, claiming legal malpractice for Keldermans' failure to include the REAs in the Walgreens lease. Noting that the project had fallen through nearly four years prior to the lawsuit being initiated, defendants moved to dismiss the complaint on the ground that it was barred by the statute of limitations. In response, plaintiffs conceded that the statute of limitations had run on the claim but argued that equitable tolling should apply. The circuit court disagreed and found that the statute of limitations barred plaintiffs' claim, and plaintiffs now appeal.

¶ 6 “A section 2–619 motion to dismiss admits the legal sufficiency of the complaint and raises defects, defenses or other affirmative matters, such as the untimeliness of the complaint.” (Internal quotation marks omitted.) *Federated Industries, Inc. v. Reisin*, 402 Ill. App. 3d 23, 27 (2010). “Defendants have the burden of proving the affirmative defense relied upon in a section 2–619 motion, and such a motion should only be granted if the record establishes that no genuine issue of material fact exists.” *Id.* We review a section 2–619 dismissal *de novo*. See *id.*

¶ 7 In this case, defendants contend that plaintiffs' cause of action accrued for the purpose of the statute of limitations on May 9, 2008, which is when TCF cancelled its sales contract with Area Wide due to Area Wide's failure to secure the REAs from Walgreens. Plaintiffs do not dispute this as the date of accrual, and in any event they do not argue that a later date should apply by operation of the discovery rule. See, e.g., *Hermitage Corp. v. Contractors Adjustment Co.*, 166 Ill. 2d 72, 84-85 (1995) ("When a plaintiff uses the discovery rule to delay commencement of the statute of limitations, the plaintiff has the burden of proving the date of discovery."); see also Ill. S. Ct. R. 341(h)(7) (eff. Feb. 1, 2007) (points not argued are forfeit). Without any argument or evidence from plaintiffs that another date should apply, we assume that plaintiffs' claim accrued at the latest on May 9, 2008. Malpractice claims against attorneys must be brought within two years of the date of accrual (see 735 ILCS 5/13-214.3 (West 2010)), and so the limitations period ran on May 9, 2010. Plaintiffs did not file their lawsuit until April 10, 2012, however, nearly two years after the end of the statute of limitations.

¶ 8 The only argument that plaintiffs raise in opposition to applying the statute of limitations to this case is equitable estoppel.¹ "A party whose conduct has caused another to delay filing suit until after the limitations period has run may be estopped from asserting the statute of limitations as a bar to the action. To prevail on this theory, the party asserting estoppel must establish that she reasonably relied upon the other party's conduct or representations in forbearing suit." *Weatherly v. Illinois Human Rights Commission*, 338 Ill. App. 3d 433, 440 (2003). Specifically, the plaintiff must show that:

¹ It is important to note that equitable estoppel is distinct from equitable tolling. While the doctrines are somewhat similar and both may be invoked to defeat a statute of limitations defense, equitable tolling generally applies when a plaintiff is somehow prevented from asserting a claim through no fault of the defendant, whereas a defendant may be equitably estopped from raising the statute of limitation as a defense if the defendant is responsible for a plaintiff's failure to timely assert a claim. See *Weatherly v. Illinois Human Rights Commission*, 338 Ill. App. 3d 433, 440 (2003); see also generally *Ralda-Sanden v. Sanden*, 2013 IL App (1st) 121117 (discussing the principles of equitable tolling).

“(1) defendant has made some misrepresentation or concealment of a material fact; (2) defendant had knowledge, either actual or implied, that the representations were untrue at the time they were made; (3) plaintiff was unaware of the untruth of the representations both at the time they were made and the time they were acted upon; (4) defendant either intended or expected his representations or conduct to be acted upon; (5) plaintiff did in fact rely upon or act upon the representations or conduct; and (6) plaintiff has acted on the basis of the representations or conduct such that he would be prejudiced if defendant is not estopped.” (Internal quotation marks omitted.) *Wheaton v. Steward*, 353 Ill. App. 3d 67, 71 (2004).

Most importantly for this case, “[a] plaintiff must have had no knowledge or means of knowing the true facts within the applicable statute of limitations.” *Id.*

¶ 9 Plaintiffs point to two alleged misrepresentations by defendants that plaintiffs contend they relied on. First, plaintiffs assert that after the lack of REAs in the Walgreens lease caused TCF to cancel the sale, defendants failed to alert plaintiffs that plaintiffs had a potential cause of action against them. Plaintiffs contend that defendants had a fiduciary duty to notify plaintiffs of the existence of the cause of action, and that defendants’ failure to speak constitutes a material misrepresentation for the purpose of estoppel. Yet plaintiffs cite no case law for this proposition, and their complaint does not allege a breach of fiduciary duty. Indeed, plaintiffs’ argument on this point seems to conflate equitable estoppel with fraudulent concealment, which is a cause of action in its own right and must be pled in the complaint. See *Kheirkhavash v. Baniassadi*, 407 Ill. App. 3d 171, 180-81 (2011). Regardless, plaintiffs’ neither raised fraudulent concealment in their complaint nor argued this issue to the circuit court during proceedings on the motion to

dismiss, so the issue is forfeit and we need not consider it. See *Eagan v. Chicago Transit Authority*, 158 Ill. 2d 527, 534 (1994) (“[I]ssues not raised in the trial court may not be raised for the first time on appeal.”).

¶ 10 Second, plaintiffs contend that after the lack of REAs was discovered, defendants assured plaintiffs that defendants could successfully negotiate with Walgreens in order to obtain the REAs. According to Mohamed, he was told that a partner at Holland & Knight had a special relationship with Walgreens’ in-house counsel. Plaintiffs contend that they were lulled into a false sense of security by defendants’ repeated assurances that negotiations with Walgreens were on track and would result in the REAs being granted.

¶ 11 Plaintiffs attempt to analogize this case to a factually similar legal malpractice case, *Jackson Jordan, Inc. v. Leydig, Voit & Meyer*, 158 Ill. 2d 240 (1994). In *Jackson*, a law firm gave the plaintiff erroneous advice related to a patent dispute. The firm advised the plaintiff that the plaintiff’s plan to manufacture and sell railroad track maintenance equipment would not infringe on any existing patents. See *id.* at 243. Unbeknownst to the firm, however, a similar patent was held by another company, which later sued a competitor of the plaintiff. See *id.* at 244. When the plaintiff learned of the lawsuit, it sent a copy to the firm and asked for advice on whether its equipment would infringe on the patent. See *id.* at 244-45. The firm advised the plaintiff that the competitor’s patent was invalid and outlined two possible defenses that the plaintiff could successfully raise if sued. See *id.* at 245. When the competitor eventually accused the plaintiff of infringement, the firm once again advised the plaintiff that it was safe from liability. See *id.* On the firm’s advice, the plaintiff filed a declaratory judgment lawsuit against the competitor in order to invalidate the patent but the competitor counterclaimed for patent infringement and eventually prevailed against the plaintiff. See *id.* at 247. The plaintiff

then sued the firm for malpractice due to its erroneous advice. See *id.* The firm raised the statute of limitations as a defense, and the circuit court dismissed the case. See *id.* The judgment was reversed by the supreme court, which held that the firm was estopped from relying on the statute of limitations under these circumstances. See *id.* at 253. The supreme court reasoned that the firm's assurances that the plaintiff was on sound legal footing "lulled [the plaintiff] into a false sense of security." *Id.*

¶ 12 Plaintiffs also rely on the similar case of *Witherell v. Weimer*, 85 Ill. 2d 146 (1981), which involved a claim of medical malpractice. In that case, the plaintiff suffered debilitating leg pain after taking birth control pills prescribed by the defendant doctor. The doctor assured the plaintiff that an underlying muscular disorder was at fault and persuaded her to continue taking the prescription, but a second opinion that plaintiff sought years later revealed that blood clots caused by the birth control pills were at fault. When sued, the doctor raised the statute of limitations as a defense, but the supreme court held that equitable estoppel precluded the defense, noting that "[h]ad it not been for the alleged constant reassurance *** and had [the defendant] not persuaded [the plaintiff] it was safe to resume taking [the prescription] after she voluntarily quit, [the] plaintiff's action would not have been so long delayed." *Id.* at 158.

¶ 13 On the surface, this case does seem very similar to *Jackson* and *Witherell*, but there is a crucial difference. The dispositive factor in both *Jackson* and *Witherell* was that the actions and reassurances of the defendants in those cases precluded the plaintiffs from realizing that a cause of action against them existed until after the statute of limitations had run. For example, in *Jackson* the defendant repeatedly assured the plaintiff that it could not be liable for patent infringement, and in *Witherell* the defendant persuaded the plaintiff that her leg pain was not caused by a pill that the defendant himself had prescribed. In both cases, the defendant's actions

led the plaintiff to believe that there was nothing wrong until it was too late to file a lawsuit for malpractice against the defendant.

¶ 14 That is not the situation here, however. The complaint and Mohamed's affidavit make clear that plaintiffs were aware very early on that Keldermans failed to include the REAs in the Walgreens lease. Indeed, defendants acknowledged the mistake and worked extensively with plaintiffs in order to remedy the problem by negotiating with Walgreens. Unlike *Jackson* and *Witherell*, defendants in this case did nothing to hide the alleged malpractice from plaintiff.

¶ 15 This is crucial because by the time defendants began negotiating with Walgreens to obtain the REAs, the damage was not only done but plaintiffs knew that Keldermans was at fault. Plaintiffs conceded at oral argument on the motion before the circuit court that plaintiffs incurred damages when TCF backed out of the deal, and plaintiffs were fully aware that the damage had been caused by Keldermans' failure to include the REAs in the Walgreens lease. Indeed, TCF cited the lack of REAs when it broke the contract. So by May 9, 2008, plaintiffs knew that Keldermans' negligence cost them the sale price of the TCF contract. Even if defendants persuaded Walgreens to grant the REAs, they were essentially worthless because TCF had cancelled the deal. Mohamed attested that he might have been able to coax TCF back if he had obtained the REAs or could have sold the property to another buyer, but this would merely mitigate the damages that he had already incurred. Estoppel cannot apply in this situation because plaintiffs were fully aware of their injury within the statute of limitations period, unlike the plaintiffs in *Jackson* and *Witherell*.

¶ 16 Nevertheless, there is a more fundamental problem with plaintiffs' estoppel argument. Let us assume for the sake of argument that it was reasonable for plaintiffs to wait to file suit based on defendants' representations that they could convince Walgreens to grant the REAs, and

that obtaining the REAs would have solved the problem. In order for estoppel to apply, defendants must have known that their representations were untrue. See *Wheaton*, 353 Ill. App. 3d at 71. Yet there is no indication anywhere in the complaint or affidavits that defendants were negotiating with Walgreens in bad faith merely as a delaying tactic, or that they knew all along that it would be impossible to obtain the REAs. Plaintiffs merely state that defendants tried to obtain the REAs through the firm's contact at Walgreens but failed. Without at least some evidence that defendants knew they could not obtain the REAs or were negotiating in bad faith, estoppel cannot apply.

¶ 17 Plaintiffs have therefore not shown that equitable estoppel should bar defendants from asserting the statute of limitations in this case. Because it is otherwise undisputed that plaintiffs filed their lawsuit beyond the limitations period, it must be dismissed.

¶ 18 Affirmed.